SKS PAVILLION SDN BHD v.
TASOON INJECTION PILE SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
AHMAD KAMAL MD SHAHID JC
[ORIGINATING SUMMONS NO: JA-24C-07-09-2017]
12 JULY 2018

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decision of adjudicator – Jurisdiction of adjudicator – Whether adjudicator could determine claim based on payment claim which lacked necessary cause of action – Whether adjudicator could determine claim based on final account, extension of time, variations and loss and expenses for delay – Whether adjudicator acted in excess of adjudication – Construction Industry Payment and Adjudication Act 2012, ss. 5(2)(a) & 15(b), (d)*

CONSTRUCTION LAW: *Adjudication – Setting aside – Application to set aside decision of adjudicator – Allegations of breach of natural justice – Whether adjudicator correct in refusing to take into account reply – Whether adjudicator could rely on judgments that were not referred to him by parties – Whether there was breach of natural justice – Whether adjudication decision ought to be set aside – Construction Industry Payment and Adjudication Act 2012, ss. 5(2)(a) & 15(b), (d)*

The defendant had initiated a proceeding against the plaintiff for non-payment, under the Construction Industry Payment and Adjudication Act 2012 ('CIPAA'). The adjudication decision was in favour of the defendant and the defendant served a winding-up notice, pursuant to s. 465(1)(e), read with s. 46(1)(a) of the Companies Act 2016, to the plaintiff for the payment of the adjudicated debt. Hence, the present application by the plaintiff to set aside the adjudication decision ('encl. 1'), pursuant to s. 15(b) and (d) of the CIPAA, on the grounds that (i) the adjudicator acted in excess of his jurisdiction as (a) the payment claim was unlawful, void and of no effect as it did not state the due date of the amount claimed, as required under s. 5(2)(a) of the CIPAA; (b) the defendant's claim, based on the purported final account, was not within the scope of the CIPAA, which was limited to interim or progress payments; (c) the defendant's claim for extension of time was not within the scope of CIPAA, which was limited to payment for work done under the express terms of the construction contract; (d) the defendant's claim for loss and expense for delay was not within the scope of the CIPAA, which was limited to payment for work done under the express terms of the construction contract; and (e) the defendant's claim for variations was not within the scope of the CIPAA, which was limited to payment for work done under the express terms of the construction contract; and (ii) there was a breach of natural justice as (a) the adjudicator refused to take into account the plaintiff's reply; and (b) the adjudicator relied on judgments in the adjudication decision that had not been referred to him by neither the plaintiff nor the defendant.

Held (allowing encl. 1):

(1) The payment claim did not state the due date for the payment of the amount claimed of RM2,237,350.20 for the final account. The cause of action was determined based on whether the defendant relied on the final account or of the final certificate and the due date for payment. The due date for payment was essential for a cause of action, as it was only if this date had passed that the defendant had an accrued cause of action. Therefore, the payment claim must state the cause of action that the defendant relied on, as the adjudicator's jurisdiction was limited to the cause of action stated in the payment claim. Since the defendant had not included these basic and essential requirements in the payment claim, the payment claim was invalid and the adjudicator did not have jurisdiction. Only this ground was sustainable and had merit in law. (paras 12, 14, 15 & 50)

(2) The scope of the CIPAA is not limited to interim claims only but also final accounts and/or final progress claims. The adjudicator was clearly within his jurisdiction in relation to the defendant's claim which was based on the purported final account. Further, the law empowers the adjudicator to determine loss and expense claims for delay and variations. The defendant demonstrated the entitlement for losses and expenses claim arising from delays caused by the plaintiff which materially affected the defendant. In this regard, the defendant was entitled to loss and expense. Since the claim of loss and expenses was clearly within the jurisdiction of the adjudicator, the issues of extension of time would also then be accordingly within the ambit of the jurisdiction of the adjudicator under the CIPAA. Without issues and facts of the relevant extension of time applicable in the contract being determined, a loss and expenses claim would not be able to be quantified. The plaintiff's arguments on the above grounds were devoid of merit, unsustainable and misconceived in law. (paras 28, 31, 35, 37 & 42)

(3) The plaintiff had an opportunity to reply the issue in the adjudication response but failed to do so. Even if the plaintiff had insufficient time to revert on the issue of the expert report, there should have, at least, an application for extension of time to file the adjudication response to the adjudicator but there was none in this case. The adjudicator correctly disregarded the respondent's reply. The CIPAA does not provide an express right/entitlement for the plaintiff to file a respondent's reply in reply to the adjudication reply. The current proposition of the plaintiff was illogical where any additional submissions and/or reply not provided under the CIPAA amounted to a breach of natural justice. Furthermore, the judgments relied on by the adjudicator in the adjudication decision, which was not referred to him by the plaintiff and the defendant, was well within the jurisdiction of the adjudicator. (paras 45-47 & 49)

Case(s) referred to:

Bertam Development Sdn Bhd v. R & C Cergas Teguh Sdn Bhd [2017] 1 LNS 1556 HC ***(refd)***

Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal [2018] 2 CLJ 163 CA ***(refd)***

Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases [2015] 1 LNS 1435 HC ***(refd)***

Syarikat Bina Darul Aman Bhd & Anor v. Government of Malaysia [2018] 4 CLJ 248 HC ***(refd)***

Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case [2017] 1 LNS 177 HC ***(refd)***

UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case [2015] 5 CLJ 527 HC ***(refd)***

Usahasama SPNB-LTAT Sdn Bhd v. ABI Construction Sdn Bhd [2016] 7 CLJ 275 HC ***(refd)***

View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2017] 1 LNS 1378 FC ***(refd)***

WRP Asia Pacific Sdn Bhd v. NS Bluescope Lysaght Malaysia Sdn Bhd & Other Case [2015] 1 LNS 1236 HC ***(refd)***

Legislation referred to:

Companies Act 2016, ss. 46(1)(a), 465(1)(e),

Construction Industry Payment and Adjudication Act 2012, ss. 5(2)(a), 15(b), (d), 26, 27

Rules of Court 2012, O. 92 r. 4

Other source(s) referred to:

Wai Loon & Ivan YF Loo, *Construction Adjudication in Malaysia*, 2nd edn, Sweet & Maxwell Asia 2018, paras. 4.035 to 4.036 & 4.062 to 4.065

For the plaintiff - LM Looi; M/s Dennis Nik & Wang

For the defendant - T Baskaran & Roveena Tara; M/s DS Tara & Co

Reported by Najib Tamby

JUDGMENT

Ahmad Kamal Md Shahid JC:

Introduction

[1] This is an application by the plaintiff by way of originating summons (OS) dated 30 September 2017 (encl. 1) under s. 15(b) and (d) of the Construction Industry Payment and Adjudication (CIPAA) Act 2012 and O. 92 r. 4 of the Rules of Court (ROC) 2012 for the following orders:

(a) Bahawa Keputusan Adjudikasi bertarikh 28.8.2017 dan Awad Pembetulan bertarikh 4.9.2017 di dalam adjudikasi di antara Plaintif dan Defendan diketepikan;

(b) Bahawa kos di dalam dan bersampingan permohonan ini dibayar oleh Defendan kepada Plaintif;

(c) Apa-apa relif selanjutnya atau yang lain yang dianggap sesuai dan adil oleh Mahkamah yang Mulia ini.

[2] The following affidavits have been filed pursuant to the OS (encl. 1):

(i) the plaintiff's first affidavit (vol. 1, vol. 2 & vol. 3); affirmed by Andy Law Yee Poh on 29 September 2017 ("the plaintiff's first affidavit");

(ii) the defendant's affidavit in reply (1) affirmed by Chia Wah Siang on 23 October 2017 (vol. 1, vol. 2, vol. 3, vol. 4, vol. 5, vol. 6, vol. 7 & vol. 8) ("the defendant's affidavit in reply (1)");

(iii) the plaintiff's second affidavit affirmed by Andy Law Yee Poh on 13 November 2017 ("the plaintiff's second affidavit"); and

(iv) the defendant's affidavit in reply (2) affirmed by Chia Wah Siang on 21 November 2017 ("the defendant's affidavit in reply (2)").

Salient Facts

[3] The defendant had initiated a proceeding under CIPAA Act 2012 against the plaintiff due to non-payment by the plaintiff pursuant to the letter of award dated 29 April 2014 and the agreement and Conditions of Building Contract (Private Edition with Quantities) Edition 2006.

[4] The adjudication decision on 28 August 2017 read with the corrective award dated 4 September 2017 (adjudication decision) was delivered in favour of the defendant and pursuant to the adjudication decision, the plaintiff was to pay to the defendant the following:

(i) the adjudicated amount of Ringgit Malaysia Three Million Three Hundred Forty Five Thousand One Hundred Seventeen and cents Sixteen (RM3,345,117.16);

(ii) an interest at the rate of 7.85% per annum on RM1,140,206.96 being the payment due under Interim Certificate No. 13 which interest shall be calculated from 16 December 2016 (being the date on which the payment become due and payable) until 5 April 2017 (being the date of the notice of adjudication);

(iii) an interest at the rate of 5% per annum on the adjudicated amount, which interest shall be calculated from 5.4.2017 being the date of the notice of adjudication until the date of full settlement;

(iv) Ringgit Malaysia Twenty Three Thousand Nine Hundred Thirty Seven and Cents Forty Nine (RM23,937.49) being reimbursement of half of the adjudication costs which the claimant has deposited with KLRCA); and

(v) Ringgit Malaysia Twenty Thousand (RM20,000) as party-to-party costs for the adjudication reference which amounted to the aggregate sum of RM3,489,592 as at 11 September 2017 (adjudication debt).

[5] The defendant served a statutory winding up notice pursuant to s. 465(1)(e) read with s. 46(1)(a) of the Companies Act 2016 dated 11 September 2017 to the plaintiff for the payment of the adjudicated debt.

The Grounds For The Application To Set-aside The Adjudication Decision Dated 28 August 2017 And The Corrective Award Dated 4 September 2017

[6] The plaintiff has raised a total of five grounds in supporting their contention that the adjudicator has acted in excess of his jurisdiction.

[7] The particulars of which are as follows:

(i) the payment claim does not state the due date for payment of the amount claimed in accordance with s. 5(2) (a) of the CIPAA Act 2012. As such, the payment claim is unlawful, void and of no effect. The adjudicator therefore has no jurisdiction;

(ii) the defendant's claim based on the purported final account is not within the scope of the CIPAA Act 2012, which is limited to interim or progress payments. The aforesaid claim is accordingly outside the jurisdiction of the adjudicator;

(iii) the defendant's claim for extension of time is not within the scope of the CIPAA Act 2012, which is limited to payment for work done under the express terms of the construction contract. The aforesaid claim is accordingly outside the jurisdiction of the adjudicator;

(iv) the defendant's claim for loss and expense for delay is not within the scope of the CIPAA Act 2012, which is limited to payment for work done under the express terms of the construction contract. The aforesaid claim is accordingly outside the jurisdiction of the adjudicator; and

(v) the defendant's claim for variations is not within the scope of the CIPAA Act 2012, which is limited to payment for work done under the express terms of the construction contract. The aforesaid claim is accordingly outside the jurisdiction of the adjudicator;

[8] The adjudication decision and the corrective award should be set aside on the grounds that there has been a denial of natural justice.

[9] The particulars of which are as follows:

(i) the adjudicator refused to take into account the respondent's reply; and

(ii) the adjudicator relied on judgments in the adjudication decision that had not been referred to him by either the plaintiff or the defendant. This was a denial of natural justice, in particular the rule that both sides should have an opportunity be heard.

A **The Law**

[10] Section 15 the CIPAA Act 2012 states as follows:

> Improperly procured adjudication decision
>
> 15. An aggrieved party may apply to the High Court to set aside an
B adjudication decision on one or more of the following grounds:
>
> (a) the adjudication decision was improperly procured through fraud or bribery;
>
> **(b) there has been a denial of natural justice;**
>
C (c) the adjudicator has not acted independently or impartially; or
>
> **(d) the adjudicator has acted in excess of his jurisdiction.**
>
> (emphasis added)

[11] The court's approach in granting the setting aside of the adjudication
D decisions is clearly envisaged in the case of *Ranhill E & C Sdn Bhd v. Tioxide (Malaysia) Sdn Bhd & Other Cases* [2015] 1 LNS 1435, Mary Lim Thiam Suan J (now JCA) held as follows:

> **[84]** Again, one finds the same refrain from the Court of Appeal: that *these adjudication decisions are meant to be complied with; and that it is only in "rare"*
E *cases or where it is "plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair" that the Court should wade in to interfere. I agree that this is the right approach to adopt in relation to section 15 of CIPAA 2012.* (emphasis added).

The Finding Of This Court

F *Ground 1 - Whether The Adjudicator Does Not Have Jurisdiction As The Payment Claim Does Not State The Due Date For Payment Of The Amount Claim In Accordance With Section 5(2)(A) Of The CIPAA Act 2012.*

[12] After perusing the payment claim dated 7 March 2017, I find that the adjudicator does not have jurisdiction, as the payment claim does not state
G the due date for payment of the amount claimed of RM2,237,350.20 for the final account.

[13] The payment claim dated 7 March 2017 merely states:

> We record that the works were certified complete via a Certificate of
H Practical Completion (CPC) on 11 July 2015 and the Certificate of Making Good Defects (CMGD) was issued on 25 July 2016. As such we record that the architect have breached its obligation pursuant to Clause 30.14 of the PAM 2006 Conditions of Contract for the failure to issue Final Certificate for the Works, and this in turn have caused the Employer's failure and/or neglect to make payment in pursuant to express Conditions
I of the Contract. The CPC and CMGD are appended in Schedule 4 and Schedule 5 respectively for ease reference.

[14] I am of the view that the cause of action is determined based on whether the defendant relies on the final account or the final certificate and the due date for payment. The due date for payment is an essential for a cause of action, as it is only if this date has passed that the defendant has an accrued cause of action. Therefore, the payment claim must state the cause of action that the defendant relies on, as the adjudicator's jurisdiction is limited to the cause of action stated in the payment claim.

[15] Since the defendant has not included these basic and essential requirement in the payment claim, the payment claim is invalid and the adjudicator does not have jurisdiction.

[16] Further the High Court, in *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd & Another Case* [2017] 1 LNS 177 at paras. 50, 73, 88 and 92 held that:

> [50] Learned counsel for the Respondent then submitted that, the corollary of this proposition is that a **payment claim can be treated as a nullity if it does not on its face reasonably purport to comply with section 13(2)(a) of the NSW SOP Act. I can agree with that proposition**. Simply put, it the Payment Claim on the face of it, complies with the requirements of our section 5(2)(a) to (d) CIPAA, this Court would not interfere with the decision of Adjudicator on ground that he should have decided that there was no valid Payment Claim on the merits or on the interpretation of the law.
>
> [73] **If it is a question of the competence of the adjudicator as in he has not been properly appointed in that what purported to be a payment claim, is not on the face of it a payment claim** or that the payment claim was not served or that it was not expressly stated as a claim made under CIPAA, then this *court would be at liberty to set aside the adjudication decision on ground of excess of jurisdiction. This in not only because the adjudicator cannot decide on his own competence or capacity to adjudicate when the very validity of his appointment is questioned but also that it is part of the legislative intent that if there is non-compliance with a basic and essential requirement of CIPAA with respect to a payment claim under s. 5, then the adjudication proceedings and the decision made would be a nullity*.
>
> [88] It goes without saying that the *powers of an adjudicator are to be exercised only in cases where he has jurisdiction. If he has no jurisdiction with respect to deciding a dispute before him, then it does not make sense to talk of his exercising his powers, be it to cure a non-compliance with any provision of the Act or to extend his jurisdiction which he does not have to begin with*.
>
> [92] It would appear that s. 26 of CIPAA is only applicable to non-compliance which the adjudicator has jurisdiction to decide and which would not be reviewable by the court. I would agree with the respondent that s. 26 does not apply to non-compliances which affects the adjudicator's very own jurisdiction or capacity to hear and decide the matter with respect to competence and 'capacity to hear' jurisdiction. In such a challenge, it is the court and not the adjudicator who will decide on such non-compliances ... (emphasis added)

[17] Lam Wai Loon and Ivan YF Loo in his book titled *Construction Adjudication in Malaysia* (2nd edn, Sweet & Maxwell Asia 2018) at paras. 4.035 to 4.036, and 4.062 to 4.065 had stated:

> [4.035] The CIPAA Act 2012 and the Construction Industry Payment & Adjudication Regulations 2014 do not provide the particulars required for identifying the amount claimed and due date for payment of the amount claimed for the purposes of section 5(2)(a) of the CPA Act 2012.
>
> For the purposes of clarity, it is suggested that the following details should be provided in a payment claim:
>
> (a) the breakdown of the items constituting the claimed amount;
>
> (b) the description of these items;
>
> (c) the quantity or quantum of each item;
>
> (d) the calculations which show how the claimed amount is derived;
>
> (e) the date when payment was due.
>
> [4.036] Having said that, per Lee Swee Seng J in *Terminal Perintis Sdn Bhd v. Tang Ngee Hong Construction Sdn Bhd and Another Case*, the unpaid party is not obliged to provide such particularity required of a pleading. **It would be sufficient if the basic information with regard to the payment amount claimed and its due date for payment have been provided**, to the extent that a reasonable person in the position of the non-paying party would be able to understand the claim made therein which is said to be due and payable based on the particulars provided in the payment claim.
>
> [4.062] It is submitted that the requirements set out in section 5(2) of the CIPAA Act 2012 are provided so that the non-paying party can be alerted at the time when he is served with a payment claim about the amount, nature and basis of the claim, and that the unpaid party was seeking to activate the statutory adjudication process. This is so that the non-paying party would be given adequate opportunity at the outset to prepare and to respond to the payment claim. *The Explanatory Statement to section 5 of the CIPAA Act 2012 which uses the mandatory word "must" (although the same word is not used in section 5 itself) further emphasises the importance of compliance with the requirements as provided.*
>
> [4.063] Nonetheless, not every non-compliance of the requirements set out in section 5(2) of the Act would render the adjudication null and void. In *Terminal Perintis Sdn Bhd v. Tan Ngee Hong Construction Sdn Bhd* and another case, Lee Swee Seng J held that *only such non-compliance of the "basic and essential requirement of the Act" which goes towards jurisdiction would have the effect of rendering the adjudication proceedings a nullity, and the decision made there from to be set aside …*
>
> [4.064] *The second type of jurisdiction is called competency jurisdiction, which goes to the validity of the appointment of the adjudicator. An acceptance of an invalid appointment would not clothe the acceptor with the office of adjudicator. It follows that any purported adjudication of that payment claim and any other enforcement procedures provided under the CIPAA Act 2012 founded upon that payment claim*

must be a nullity. Instances falling within this category of jurisdiction include a document purporting to be a payment claim but in actual fact, is not; and a payment claim which was not served …

[4.065] *Similarly, non-compliance which goes to the competency jurisdiction of the adjudicator would render the adjudication null and void and his decision to be set aside. The learned judge reasoned that this is not only because adjudicator cannot decide on his own competence or capacity to adjudicate when the very validity of his appointment is questioned, but also that it is part of the legislative intent that if there is such non-compliance with a basic and essential requirement of section 5 of the CIPAA Act 2012, the adjudication proceedings and the decision made would be a nullity*. (emphasis added)

[18] I am of the opinion that as a result of the defendant relying on the final account, which has no due date for payment, and failure to state the due date of payment of the final certificate in the payment claim, the plaintiff was prejudiced, as they took the position that the final accounts were incomplete and payments were not due.

[19] I find support, in this context, on ss. 5 and 27 of the CIPAA Act 2012 which provides:

Payment Claim

5(1) An unpaid party may serve a payment claim on a nonpaying party for payment pursuant to a construction contract.

(2) **The payment** claim shall be in writing and **shall include**:

(a) the amount claimed and **due date for payment** of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act

Jurisdiction of adjudicator

27. (1) Subject to subsection (2), the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6.

(2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1)." (emphasis added)

[20] The requirement to state the due date for payment in the payment claim is mandatory in the light of the word "shall" in s. 5(2) (a) of the CIPAA Act 2012.

[21] In the recent judgment of the Federal Court, in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2017] 1 LNS 1378 at paras. 54-57 pp 562-563, it was held:

> [54] The principle that jurisdiction is about subject-matter applies to every statute. Thus, CIPAA applies only to "construction contracts" as defined under the Act (see sections 2, 3 & 4) and that the "payment dispute" must arise under a construction contract. These are fundamental jurisdictional premises for CIPAA to apply. Sections 5 and 6 of CIPAA relate to this. Section 5 of CIPAA speaks of a "payment pursuant to a construction contract". By section 4 of CIPAA, "payment" is defined as "payment for work done ... under the express terms of a construction contract". The response under section 6 of CIPAA has to be in relation to the "payment" claim under sections 4 and 5 of CIPAA as to whether it is admitted or disputed.
>
> [55] By section 27(1) of CIPAA, the arbitrator's jurisdiction "is limited to the matter referred to adjudication" pursuant to sections 5 and 6 of CIPAA. It refers to the "identification of the cause of action" in relation to the construction contract as required under section 5(2)(b) of CIPAA. In turn, the payment response under section 6 of CIPAA is defined and limited by the claim under section 5 of CIPAA.
>
> [56] *In short, section 27(1) of CIPAA refers to the subject matter of the claim under section 5 of CIPAA, which is the "cause of action" identified by the claimant by reference to the applicable clause of the construction contract*. Thus if the payment claim relates to Progress Claim No. 28 (as in the present case) the jurisdiction of the Adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to Progress Claim No. 28.
>
> [57] *It can thus be said that the appellant's case regarding the jurisdiction referred to in section 27(1) of CIPAA, is the subject matter of the claim and the cause of action as that identified under the relevant provision of the construction contract*. By section 27(2) of CIPAA, the parties may by consent extend the jurisdiction of the Adjudicator to cover other matters. A typical example will be that of other progress claims falling due before the adjudication commences. Section 27(1) of CIPAA has nothing to do with the grounds of the claim or the reasons for opposing the claim. (emphasis added)

[22] I am also of the view that an adjudicator cannot cure an irregularity in a payment claim under s. 26 or decide a challenge on jurisdiction due to a non-compliant payment claim, as the adjudicator does not have the competence or jurisdiction to do this in the absence of a payment claim that complies with s. 5. (See *Terminal Perintis Sdn Bhd supra*).

[23] Case law also established that a challenge to the adjudicator's jurisdiction is not lost simply because it was not raised during the adjudication proceedings. This can be seen from the judgment of the High Court, in *Ranhill E & C Sdn Bhd supra* at paras. 41 to 43 pp. 244-245:

> [41] But first, let me say that this issue of the jurisdiction of the adjudicator to hear and determine the dispute to start with is one that may or may not be disposed of by the adjudicator. The fact that an adjudicator decides on the issues, as was the case with Adjudicator Leon, or declines to do so, as was the case with Adjudicator Murali, is no reason to say that either is wrong or right.
>
> [42] This issue of jurisdiction in any sense, whether that of the adjudicator's competence to hear the dispute, or whether the dispute concerned a matter that was within CIPAA 2012, may be brought up and dealt with at the adjudication proceedings. **The fact that it was not; or, if brought up, how it was dealt with, does not deprive any party from raising the same issue again in proceedings in Court, be it in the setting aside application; or any other proceedings**.
>
> [43] The reasons are quite simple: at the time of the adjudication proceedings, the adjudicator should be allowed to get on with the substantive issues given the strict and limiting conditions that adjudication operates within. The fact that section 15 recognizes the ground of excess of jurisdiction, without defining the meaning of 'jurisdiction', indicates that a challenge of jurisdiction is not lost if it was not raised in the adjudication proceedings; or if raised, cannot be brought up again. In either of our present situations, and we have two contrasting approaches, the adjudicators were not wrong; neither were the parties. (emphasis added)

[24] I am also of the opinion that jurisdictional challenges may be taken at any time by the plaintiff. Thus a jurisdictional challenge not raised before an adjudicator does not amount to a waiver as the adjudicator does not have jurisdiction to decide such a challenge. (See *Terminal Perintis Sdn Bhd (supra)*].

[25] The High Court in *WRP Asia Pacific Sdn Bhd v. NS Bluescope Lysaght Malaysia Sdn Bhd & Other Case* [2015] 1 LNS 1236 at paras. 25, 26, 28, 33 and 40 held as follows:

> [25] Jurisdictional challenges my arise in several ways; it may be in respect of the subject matter of the adjudication; or it may be in respect of the jurisdiction of the Adjudicator to hear and determine the adjudication. **In my view, regardless the type of or reason for the challenge; that challenge may be taken at any time**. When taken, it is open to the Adjudicator to consider first of all whether to deal with the challenge at all; or to simply proceed with the adjudication without dealing with the challenge ...
>
> [26] *Where the adjudicator deals with the challenge, regardless the decision, the same challenge may be taken again in an application to set aside the decision under s. 15, especially para. 15(d). Although they may be the occasion where conduct or some particular or special circumstance presents so that an argument may possibly be*

A *validly or convincingly made to suggest the application of the principle of waiver and estoppels, and I believe that, that would be the exception, I would say that the doctrine generally would not operate in the case of CIPAA 2012.*

[28] For these reasons, it makes sense why there is sub-s. 27(3); that where the parties raise issues of jurisdiction, the adjudicator is not obliged B to decide on such issues but may instead proceed with the adjudication. In such circumstances, the party raising the issue has the right to raise this same issue later under ss. 15 or 28. **Since the law already reserves such a party that right, it stands to reason that the doctrine of waiver does not *ipso facto* apply**. There must be strong cogent and persuasive circumstances to persuade the court to consider otherwise. In any event, C the Adjudicator's decision is not determinative of the issue and is reviewable by the court under s. 15. (emphasis added).

[26] It is also my considered view that the mandatory requirements of s. 5 CIPAA Act 2012 cannot be waived, as they are statutory requirements. The High Court, in *Usahasama SPNB-LTAT Sdn Bhd v. ABI Construction* D *Sdn Bhd* [2016] 7 CLJ 275 at 301 held that:

[42] There can be no estoppel as against a statute. See the case of *JMB Silverpark Sdn Bhd v. Silverpark Sdn Bhd & Anor* [2012] 1 LNS 1082; [2013] 9 MLJ 714 at p. 726. In *United Malayan Banking Corporation Sdn Bhd v. Syarikat Perumahan Luas Sdn Bhd* [1998] 3 MLJ 352b Edgar Joseph Jr J E (as he then was) at p. 356 held: "The defence of estoppel accordingly fails since there cannot be an estoppels to evade the plain provisions of a statute." Much earlier in *Kok Hoong v. Leong Cheong Kweng Mines Ltd* [1963] 1 LNS 61; [1964] 1 MLJ 49 Viscount Radcliffe, Privy Council, at p. 54 had affirmed that "... a party cannot set up estoppels in the face of a statute ..." Here the plaintiff had raised the jurisdictional challenge at the first F preliminary meeting and in the circumstance it was timeously and promptly raised.

[27] Based on the above reasons, I find the plaintiff's contention in ground no. 1 is sustainable and has merit in law but for completeness I will discuss plaintiff's other grounds in this judgment.

G *Ground 2 - Whether The Adjudicator Does Not Have Jurisdiction, As The Defendant's Claim Is Based On The Purported Final Account*

[28] I am of the view the scope of CIPAA Act 2012 is not limited to interim claim only but also final account and/or final progress claim.

H **[29]** In *UDA Holdings Bhd v. Bisraya Construction Sdn Bhd & Anor And Another Case* [2015] 5 CLJ 527 at 576 ("*UDA Holding* case") it was held that "final progress claims" is within the scope of CIPAA Act 2012. Mary Lim J (now JCA) in the case stated as follows:

I [155] *... Adjudication and the Act for that matter, is but a piece of legislation emplaced by Parliament to provide for, inter alia, a mechanism to speedily settle payment disputes which in reality are disputes over interim and final progress claims.* The payment disputes arise under the construction contract that

underpins the relationship between the parties; and Parliament has decided to legislate by reference to the construction contract and not, the payment dispute. That is the material or relevant point of reference and not the date of the payment dispute. We should not attempt to rewrite those terms lest the court be accused of trespassing on the jurisdiction of Parliament to legislate. See the decision of *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 in this regard. (emphasis added)

[30] The decision of the *UDA Holding* case was affirmed in the recent Court of Appeal case of *Martego Sdn Bhd v. Arkitek Meor & Chew Sdn Bhd & Another Appeal* [2018] 2 CLJ 163. The pertinent parts of the judgment are as follows:

[49] Our views are reflective of the views held by the learned authors and practitioners in CIPAA 2012 regime. In the book titled - **Adjudication of Construction Payment Disputes in Malaysia** - the learned authors (Chow Kok Fong, Lim Chong Fong (now a sitting Judge of the High Court of Malaya) and Oon Chee Kheng), at page 45, states as follows:

> Although the Act is silent on this point, the wording of section 5(1) suggests that the term **'payment claim' does not only refer to progress payments but also extends to a claim for a one-off payment such as a final payment claim made on basis of the final accounts of a contract**.

[50] Also in the book titled - ***Construction Adjudication in Malaysia* - the learned authors (Lam Wai Loon and Ivan YF Loo)**, at page 64, states as follows:

> In this context, the 'payment' refers to a payment for work done or services rendered under the express terms of a construction contract. It does not cover payment for work to be rendered or services to be rendered under a construction contract. The payment claim may relate to either a progress claim or final claim for work done or services rendered under the express terms of construction contract. Depending on the terms of the particular construction contract, **'payment claim' in this context can include a claim for payment for preliminaries, payment due under a progress or final payment certificate**, payment for or arising from varies works or changes instructed, payment for prime cost sums, costs adjustments, provisional sums contingent sums and retention monies and payment for prolongation costs.

[52] **In our own jurisdiction, we have from our own Construction Courts in Kuala Lumpur in two cases held that CIPAA 2012 is not limited to interim claims only but also final account claims**. (emphasis added)

[31] Based on the above authorities, the adjudicator is clearly within its jurisdiction in relation to defendant's claim that is based on the purported final account. Therefore, it is my finding that plaintiff's ground no. 2 is devoid of merit.

Ground 3 - Whether The Adjudicator Does Not Have Jurisdiction, As The Defendant's Claims Are For Loss And Expense For Delay And Variations

[32] It is my view that the law clearly empowers the adjudicator to determine loss and expense claims. I find support in the High Court cases of *Syarikat Bina Darul Aman Bhd & Anor v. Government of Malaysia* [2018] 4 CLJ 248 where it was held that loss and expense claim is within the scope of CIPAA Act 2012.

[33] In the *Syarikat Bina Case Darul Aman Bhd (supra)* the plaintiff/claimant's claim was dismissed by the adjudicator and one of the reasons given by the adjudicator was that "loss and expense claim" is not a valid claim to be initiated under CIPAA Act 2012. Dissatisfied with the adjudication decision, the plaintiff/claimant had initiated an action in High Court in respect of whether the loss and expense claim is claimable as payment claim. The learned Lee Swee Seng J held that loss and expenses is claimable as the additional costs incurred for work done.

[34] The relevant passage of the judgment of the *Syarikat Bina Darul Aman Bhd* case is as follows:

> [76] *I appreciate that whilst a "loss and Expenses Claim" may in some instances be a claim for special damages arising out of breach by the principal, there are cases where contractually such a claim is allowed to be "added to the Contract Sum" or as in some cases like the present PWD 203A Standard Form of Contract it is to be claimed under a Final Account and hence payable as part of the amount claimable for the additional costs incurred for work done.* (emphasis added)

[35] Reverting to the instant case, I find that the claimant has demonstrated the entitlement for losses and expenses claim arising from delays caused by the plaintiff pursuant to cl. 23 of the contract which materially affected the defendant pursuant to cl. 24.3. of the said contract. In this regard, the defendant is entitled to loss and expense pursuant to cl. 24.1 of the contract.

[36] The law also clearly empowers the adjudicator to determine uncertified variation works claims. This can be seen in the case of *Bertam Development Sdn Bhd v. R & C Cergas Teguh Sdn Bhd* [2017] 1 LNS 1556, where Lee Swee Seng J held as follows:

> [23] The above submission is completely misplaced. This is a case where the Architect had for reasons best known to himself, failed to certify the amount outstanding under the Variation Works, Surely the Architect and the Employer cannot rely on their own breach of Clause 30.1 to refuse to make payments to the Main Contractor for the Variation Works done. Otherwise Employers and Architects could always refuse to certify claims for Works done and then contend that until the Architect do certify, there is no claim due and no payment need to be made.
>
> [30] *As the issue of the validity of the claim for uncertified Variation Works is a matter referred to in the Payment Claim and hence within the jurisdiction of the Adjudicator to decide, there is no need for a further Agreement in writing of the parties to confer jurisdiction on the Adjudicator to decide as it were, in place of the Architect.*

> It is precisely because of non-certification by the Architect and with that no payment by the Plaintiff as Employer that we have here a reference to Adjudication with respect to a Payment Claim consisting of the amount certified in the various Interim Certificates of Payment and the amount in the uncertified Variation Works. (emphasis added)

[37] Based on the above, the law clearly empowers the adjudicator to determine loss and expense claims for delay and variations and as such the plaintiff's ground no. 3 is also unsustainable and misconceived in law.

Ground 4 - Whether The Adjudicator Does Not Have Jurisdiction, As The Defendant's Claim Are For Extension Of Time

[38] The defendant submits that the plaintiff had *vide* letter dated 29 October 2015 exercised their rights to set-off the Liquidated Ascertained Damages (LAD) in the sum of RM1,141,800 as LAD (RM6,600/day x 173 days of delay) against the Interim Certificate No. 12 and Interim Certificate No. 13. (See exh. "AL-4" pp. 322-323 vol. 2 of the plaintiff's first affidavit).

[39] It is the defendant's challenge against the quantum of the LAD being set-off in the Interim Certificate No. 12 and Interim Certificate No. 13. The issue of the extension of time (EOT) arises on two fronts:

(i) EOT not sufficiently granted by architect; and

(ii) LAD being of the wrong quantum.

[40] Therefore, the issue of EOT flows from the wrongful LAD being set-off by the plaintiff against the payment claims of Interim Certificate No. 12 and Interim Certificate No. 13 without any proof of actual loss and/or damages (See exh. "AL3", paras 37-38, pp. 40-46, first volume of the plaintiff's first affidavit).

[41] In the *Syarikat Bina Darul Aman Bhd* case *(supra)* Lee Swee Seng J quoted as follows:

> [81] In the New Zealand Court of Appeal case of *George Developments Ltd* (*supra)*, His Lordship Robertson J said at paragraph 55 of the judgment:
>
> > On the inclusion of extension of time costs, we adopt the New South Wales approach. The New South Wales Act is not identical to the Act (as it requires that a payment claim identify the construction work "or related goods and services" to which it relates, in contrast to s. 20(2)(c) of the Act), but we do not think the difference is material in this context. Although the definition of construction work in s. 6 of the Act refers to physical work, **the force and thrust of the Act cannot be limited to claims for physical work actually done as opposed to costs which inevitably arise from carrying out the work**. This might include insurance costs, interest, costs of preparing a programme or an extension of time entitlement. **As long as the construction contract provides for the payee to be paid the claimed amount in consideration for its**

> **performance of construction work** (whether or not entitlement is contingent on a factor such as an extension of time being granted), **the payee is entitled to make a claim for payment in a payment claim**. If the payer's stance is vindicated, the particular amount will not have to be paid, but that will not prejudice the entitlement of the payee to be paid the other amounts claimed in the payment claim or invalidate the payment claim as a whole. (emphasis added)

[42] I am of the view that without issues and facts on the relevant extension of time applicable in the contract being determined, a loss and expenses claim would not be able to be quantified. Since the claim of loss and expense is clearly within the jurisdiction of adjudicator then issues of extension of time would also then be accordingly within the ambit of the jurisdiction of the adjudicator under CIPAA Act 2012.

[43] Based on the above, I am of the opinion that plaintiff's ground no. 4 is also unsustainable and devoid of merits.

Ground 5(a) - Whether There Has Been A Denial Of Natural Justice As The Adjudicator Refused To Take Into Account The Respondent's Reply

[44] The pertinent facts on this issue are as follows:

(i) The plaintiff had *vide* their solicitor's letter dated 7 August 2017 enclosed the "respondent's reply" to the claimant's adjudication reply (see exh. "AL-6" pp. 668-683, vol. 3 of the plaintiff's first affidavit). In essence, the respondent's reply focused on the issues of the extension of time *vis-à-vis* the expert report produced by the defendant. The relevant paragraphs of the respondent's reply are as follows:

> 2. The Respondent submits that CIPAA 2012 is silent as to this right and in the interest of natural justice, the Respondent submits that this reply ought to be considered before any Adjudication Decision is arrived at so as not deprive the Respondent from properly defending the Claimant's claim herein.
>
> 3. The Respondent reply is focused on the issues of Extension of Time *vis-à-vis* the Expert Report procured and produced by the Claimant.
>
> 4. The Respondent submits that due to the short time frame provided under CIPAA 2012 for the Respondent to file their Adjudication Response, the Respondents consultant were unable to peruse the voluminous Expert Report and to render a reply within the set time frame.

(ii) The defendant then replied to the respondent's reply *vide* their letter dated 9 August 2017 (See exh. "AL7" pp. 684-685, vol. 3 of the plaintiff's first affidavit) ("the defendant's reply"). The relevant paragraphs are as follows:

> In this regard, the Claimant objects to the Respondent's reply dated 7 August 2017. The Claimant takes the position that the Respondent does not have a right to submit the Reply under the

> CIPAA Act 2012. An application should have been made by the Respondent and leave ought to be given BEFORE the Respondent is allowed to submit the Reply to the Adjudication Reply. As such, without leave, the Reply ought to be rejected.
>
> Furthermore, the Respondent's submission is premised upon the Claimant's expert witness statement provided with the Adjudication Claim, for which the expert had relied on the Claimant's EOT applications made during the course of the Works and contemporaneous documents available to both parties in arriving at his conclusions, The Respondent's consultants would have had ample opportunity to deal with the substance of the EOT applications even before the commencement of his adjudication and certainly during the preparation of the Respondent's Adjudication Response. Accordingly the Claimant submits that the contention of "insufficient time" is out of hindsight and this is also clear evidence of the Respondent's consultants having failed and/or neglected to deal with EOT matters pursuant to the Contract Conditions.
>
> Furthermore, the Respondent ought to have made an application for a time extension to submit his Adjudication Response premised upon the same ground of "insufficient time" but failed to do so. The Claimant submits that the Respondent's current action is out with the express provisions of the CIPAA Act and is tantamount to an "ambush" in seeking to introduce arguments not made in the Payment Response in an attempt to circumvent the CIPAA Act itself.

(iii) The adjudicator later concluded in his letter dated 9 August 2017 as contained in exh. "AL8", p. 686, vol. 3 of the plaintiff's first affidavit) as follows:

> I wish to state that upon the service of the Claimant's reply to the Respondent and the Adjudicator under section 10 of the CIPAA on 4.7.2017, the onus shifts to the Adjudicator to decide the dispute and deliver his decision. In short, the subsequent stage of the proceedings is triggered off.
>
> Therefore, I would not take into account the Respondent's letter of 7.8.2017 enclosing the Respondent's reply to the Claimant's reply.

[45] I find that the plaintiff had an opportunity to reply the issue in the adjudication response but they had failed to do so. And even if the plaintiff had insufficient time to revert on the issue of the expert report, there should have at least an application for extension of time to file the adjudication response to the adjudicator but there is none in the factual matrix of the present case.

[46] It cannot be disputed that CIPAA Act 2012 does not provide an express right/entitlement for the plaintiff to file a respondent's reply in reply to the adjudication reply. The current proposition of the plaintiff is illogical where any additional "submissions and/or reply" by plaintiff not provided under CIPAA Act 2012 amounts to a breach of natural justice.

[47] Based on the above, I am of the view that the adjudicator correctly disregarded the respondent's reply.

Ground 5(b) - Whether There Has Been A Denial Of Natural Justice As The Adjudicator Relied On Judgments In The Adjudication Decision That Had Not Been Referred To Him By Either The Plaintiff Or Defendant

[48] This issue raised by the plaintiff falls within four walls in *Terminal Perintis Sdn Bhd (supra)* where Lee Swee Seng J held as follows:

> Whether there has been a breach of natural justice when the Adjudicator referred to case law authorities not cited by the parties
>
> [148] The Respondent complained that there has been a breach of natural justice as the Adjudicator had cited cases and made reliance on these decided cases of the courts not cited by either parties and more importantly, they had no opportunity to submit on. It was also contended that these case authorities related to material aspects of the Adjudication Decision in respect of the claim and set-off raised in the Adjudication.
>
> [149] I agree with learned counsel for the Claimant that CIPAA gives vast powers to an Adjudicator with respect to how to determine a dispute before him. It provides under section 25 for the following:
>
> 25. The adjudicator shall have the powers to:
>
> ...
>
> (d) Draw on his own knowledge and expertise:
>
> ...
>
> (i) I**nquisitorially take the initiative to ascertain the facts and the law required for the decision** ... (emphasis added)
>
> [150] These powers confer upon the Adjudicator the right to draw upon his own experience, knowledge, initiative and industry to consider whatever legal propositions that may be relevant as supported by the cases decided by the courts in our jurisdiction or elsewhere. I do not see this as a breach of natural justice as the breach contemplated by section 15 CIPAA is a material one where the notion of fair play and right to be heard has been blatantly disregarded resulting in patent prejudice to the parties producing a perverse decision.
>
> [151] The salutary words of Dyson J in *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] 64 ConLR 1 are worthy of repetition lest we get entangled and ensnared in unnecessary technicalities that have come to characterise many a litigation and arbitration:
>
> 14. It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the

> final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudication's is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. **So far as procedure is concerned, the adjudicator is given a fairly free hand**. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, **permitted to take the initiative in ascertaining the facts and the law** (section 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). **He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties**. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decision s of adjudicators are binding and are to be complied with until the dispute is finally resolved. (emphasis added)

[49] Based on the above, it is settled law that the judgments relied by the adjudicator in the adjudication decision that had not been referred to him by the plaintiff and the defendant is well within the jurisdiction of the adjudicator. Therefore, the plaintiff's ground no. 5 is also unsustainable and devoid of merits.

Conclusion

[50] Based on the reasons given, I find that only ground no. 1 relied upon by the plaintiff is sustainable and had merit in law.

[51] I therefore, allow the plaintiff's OS (encl. 1) with costs of RM10,000 subject to payment of an allocator fee.